



Employer's Guide to Unemployment Hearings



Hearing Representation:

Although a first hand witness must participate in an unemployment hearing, hearing representation is available at no additional charge in all states EXCEPT AZ, MO, NC, SC, SD and WV which will incur \$150 charge. Should you need assistance or wish to have representation available for a hearing, please notify your Customer Service Representative.

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What Is An Unemployment Hearing?

Unemployment hearings are not to be compared to a court of law. Rather, they are informal; so all parties can present testimony and evidence, which will enable the hearing to make a reasonable and unbiased decision.

Information already submitted to the state must be reinforced at the hearing. Any details not previously addressed should be presented. This will be your final opportunity to submit any new evidence or testimony.

Burden of Proof

The burden of proof always falls on the party who initiated the separation (moving party). If the issue is a voluntary quit, it will be the claimant's responsibility to prove the quit was for good cause attributable to the employer. However, you must defend your position if the claimant alleges he quit for work-related reasons.

If the issue is a discharge, the burden of proof is on you to show that, according to state unemployment regulations, you were justified in dismissing this person. Misconduct must be established to disqualify the claimant from receiving benefits. Misconduct is generally defined as a "willful and wanton disregard of the employer's legitimate business interests with evil or malicious intent." Gross negligence may also fall within the definition of misconduct.

We recommend you discuss the issue(s) in depth with your ADP hearings consultant prior to the hearing. Be sure to mention all details, no matter how small or insignificant they may appear. There are times when one small detail can change the whole approach to the issue.

Choosing the Witness

You should select witnesses who have personal involvement in or knowledge of the circumstances surrounding the separation from employment. Firsthand testimony outweighs all other testimony considered by the hearing officer when making his decision. Hearsay (or secondhand) testimony may be considered in the absence of firsthand testimony, yet it is insufficient to effectively prove a case. In many instances, hearsay testimony is not permissible in the hearing. Likewise, written statements from witnesses, even when notarized, do not carry the weight of firsthand testimony. If you determine you need a witness' testimony, notify him of the date, time and location of the hearing and arrange for him to be present.

Subpoenas

If you are concerned regarding the cooperation of a witness, you may request that the hearing officer issue a subpoena. Issuance of the subpoena is at the discretion of the hearing officer, so your request should include a detailed statement indicating the importance of the individual's testimony. The request must usually be made in writing and should also include the witness's name and address. When determining whether to request a subpoena, you should consider whether the witness's level of cooperation and demeanor during the hearing will help or hinder your case.

Important documents may also be subpoenaed. In your request for a subpoena of documents, include a description of the records and the name of the custodian of the records.

Written Statements In Lieu Of Attendance

Written statements in lieu of attendance at the hearing are not recommended as a remedy for nonattendance of a witness. Signed documents in lieu of testimony will be considered hearsay evidence and, in most cases, will not be accepted. In addition, if no witnesses appear for the appellant in a case, the judge will likely consider a default and dismiss the case.

Appearance at the Hearing

Arrive at the hearing location early and report to the receptionist in the hearing office. Should the appellant fail to appear on time, the hearing officer may dismiss the appeal. In some instances, a grace period will be allowed for the participants to arrive; however, the hearing officer is not bound to this courtesy.

If you are late, but are not the appealing party, the hearing may begin without you. Should you have a last-minute emergency or delay on route to the hearing, contact the Appeals Office or your ADP Unemployment hearing consultant immediately.



Unemployment Hearing Process

The hearing officer begins by explaining the legal issues, the purpose of the hearing and the procedures to be followed. He explains the order in which individuals will testify and the rights of cross-examination and rebuttal. An oath or affirmation is then administered to all witnesses.

The moving party in the separation will usually present its case first. In a case in which the claimant was discharged, the hearing officer may begin with the employer's testimony. If the claimant voluntarily quit, testimony may begin with the claimant.

The testimony given during the hearing is tape-recorded. Some hearing officers sequester witnesses while others are testifying. The hearing officer asks the witnesses specific questions regarding the separation. Witnesses should answer to the best of their knowledge with precise statements. Each side is given ample time to give testimony and present documentation. Do not interrupt while others are speaking. Instead, make notes so you may offer rebuttal later.

Each party may cross-examine witnesses. The hearing officer notifies each side when to ask questions. Only the individual designated as the representative is allowed to cross-examine. Refrain from asking questions that have already been asked and answered. Use leading question, constructing them in such a manner that they require a statement in response, rather than a "yes" or "no" answer. Do not give a hostile witness any openings. Lead into questions with statements, such as "Isn't it true," "Isn't it a fact" or "Wouldn't you agree." If the witness does not answer the question asked and rambles off the subject, remind him of the question you asked and request a "yes" or "no" answer.

In most cases, each side may offer a closing statement after all the facts and information have been given. Simply recap your main points of argument; do not rehash the entire case. If you choose not to offer a closing statement, let the hearing officer know you would like to stand on the record.

The hearing officer then concludes the hearing and states that all testimony and evidence will be considered. All interested parties are notified of the decision by mail.

Presentation at the Hearing

A witness's presentation and response to questions can have an influence on the hearing officer's decision regarding a case. Following are some keys to effective testimony at an unemployment hearing:



Think about each question before answering. This allows you the opportunity to formulate a response that will have a positive effect on the case.

Keep answers simple. Do not offer information to questions that have not been asked. This will reduce the risk of volunteering information that may be harmful to your case.

Tell the truth. You are under oath and your testimony should reflect, as accurately as possible, what you know, saw, heard or did.

Do not guess at answers. If you do not know the answer to a question, say so. If you do not have exact information, use phrases such as “approximately” or “in my estimation.” Indicating that your answer is an approximation allows you to clarify, rather than make a conflicting statement and lose credibility, if your statement is challenged.

Complete lengthy explanations with open-ended statements. Using such statements as “that is all I can recall at this time” gives you the opportunity to later add facts.

Do not use extreme statements. Such terms as “never” and “always” may cause you to lose credibility if the claimant can demonstrate exceptions to your statement.

Support your answers with facts, not conclusions. For example, instead of stating, “the claimant had to have been aware of the company policy,” state something like “the claimant was aware of the company policy through the company handbook, which he received at the time of hire. We have an acknowledgment of receipt signed by the employee.”

Ask for clarification if you do not fully understand a question. Asking that the question be restated or clarified better enables you to respond appropriately.

Make a positive impression through your appearance, demeanor and body language. Dress neatly, wearing clothes appropriate to an office setting. Use proper manners, state your point and always keep your cool. A calm, well-spoken, polite witness will make a more positive impression than a forceful, intimidating, rude witness. Never interrupt the hearing officer or claimant, even if you do not agree with what is being said. Instead, take notes and refer to a point at a later time, when it is appropriate for you to do so. Finally, portray an image of confidence to the hearing officer by using frequent eye contact.



Providing Documents as Exhibits for the Hearing

When deciding on the case, the hearing officer considers the relevant documents presented by each party at the hearing. You should bring the original and two copies of all documents you wish to present as evidence, such as medical statements, warnings, company policies, etc. In addition, for every record you intend to introduce as evidence, you should have an individual present that can testify regarding how such records were prepared and vouch for their authenticity. If either party feels a document submitted by the opposing party is irrelevant, the party may object to its entry as evidence. Be prepared to offer an explanation for your objection.

Telephone Hearings

The proceedings for the telephone hearing follow the same format as the in-person hearing, with one exception. The documentary evidence must be sent to the hearing officer and the claimant *prior* to the hearing date. Likewise, the claimant must send you a copy of any documents he wants considered as evidence. Any documents you provide to the claimant should be sent registered mail or by overnight courier. If all interested parties do not receive copies of documents, they may be excluded from evidence. If a document for which you have not received a copy is introduced as evidence, you may object to its admission as an exhibit. Even if no objection is made, the judge may still decide to exclude the document as a matter of procedure.

In addition to forwarding documentation to the state and claimant, you should make the following preparations for a telephone hearing:

If any of your witnesses will be participating from different phone numbers, notify the hearing officer of their correct numbers.

Insure the phone you will be using is in a quite area where you can avoid interruptions.

- If several people are participating from one location, attempt to have everyone in the same room with a speaker phone.
- Have all documents and files at hand for easy reference.
- Notify your switchboard that the call from the state should be put through immediately.
- Be available, even if the hearing officer does not call at the exact time given on the hearing notice.

If you have not received a call within 30 minutes of the scheduled hearing time, call the state to find out the status of the hearing.



Continuances/Postponements

At any time during the hearing, if you realize you have overlooked a vital piece of documentation or the presence of a prime witness, you should request the hearing be adjourned and continued at a later date. Do not hesitate to make this request. Even if denied, the request will become part of the record and may lay the groundwork for requesting a reopening at a later date.

Postponements may be granted in extreme circumstances only. Granting of a postponement is at the hearing officer's discretion. Pressing business engagements and vacations are not considered good cause for requesting a postponement.

Nonattendance

Reopening of a case for nonattendance can only be granted if good cause is shown for failure to appear. To reinforce the request for reopening, it is advisable to include a statement defining the information your witness has to offer and why it is pertinent to the case. There are no guarantees the state agency will grant the reopening.

Collateral Estoppel

Some states invoke the doctrine of collateral estoppel when legal proceedings involve the same parties and issues discussed in an unemployment hearing. When collateral estoppel is applied to a case, a previous valid judgment, such as the unemployment decision, may be used in other proceedings (such as a wrongful discharge or discrimination case). Some states, in an attempt to keep unemployment hearings from becoming too complex, prohibit collateral estoppel. In these states, the unemployment hearing decision applies only to the unemployment case. Any further lawsuits must be tried on their own merits.

In states that allow collateral estoppel, you should still pursue unemployment cases if they have merit. However, if the case may eventually lead to other lawsuits, you may want to seek assistance from your company's attorney or legal department. The unemployment hearing may be your only opportunity to present your case.



Issues and Evidence For Unemployment Hearing

Witnesses attending an unemployment hearing should have the following records available for all issues:

Employment History

- First day worked and last day worked
- Position or job title at the time of separation
- Rate of pay at the time of separation and prior rate of pay if there has been a recent change in rate

Disciplinary History

- Signed or unsigned warnings, suspensions, etc. by claimant, supervisor and witnesses

Performance Reviews

Policies

- Company handbook
- Union rule book
- Training manual
- Copies of posted bulletins regarding policies

Signed acknowledgment regarding receipt of handbook or union Rulebook

Exit interview form or notes

This is a general list of evidence needed for unemployment hearings. Depending on the issues, other records may be necessary to properly present your case. The following pages outline the various types of issues addressed in unemployment hearings, with suggestions for providing evidence and testimony.



Voluntary Quit_____

Records

- Signed resignation
- Medical records (if the quit is due to illness or the individual's physical condition)
- Grievance/complaint procedure
- Pension information (if the separation is for retirement)
- Exit interview form or notes

Witnesses

- Human Resource director or the person who maintains the records
- Claimant's immediate supervisor
- Possibly the claimant's co-workers or other supervisors (depending upon the stated reason for resigning)

Discharge for Misconduct_____

Records

Following are some common offenses constituting misconduct and the records needed to support your case:

Under the influence of alcohol or drugs or use of drugs or alcohol On company property

- Drug or alcohol test results
- Chain of custody records and an explanation of such
- Company handbook and/or policy
- Acknowledgment of receipt of the policy
- Explanation of rehabilitation programs available to employees and the manner in which employees are made aware of this program
- Signed agreement to take random drug tests
- Records of verbal and written warnings



Absenteeism or tardiness

- Attendance records
- Call-in sheets
- Time sheets
- Medical statements or doctor's excuses
- Company handbook and/or policy
- Acknowledgment of receipt of the policy
- Explanation of a progressive policy, if applicable
- Records of verbal and written warnings

Insubordination, refusal to follow a direct order, foul language, Rudeness to a customer, improper conduct

- Statements from customers or witnesses (if they cannot or will not attend the hearing (may be considered hearsay testimony))
- Company handbook and/or policy
- Acknowledgment of receipt of the policy
- Records of verbal and written warnings

Theft, unauthorized removal of company property

- Signed or written admission
- Video (request an in-person hearing, contact the hearing officer to determine if you must provide your own equipment and bring a copy of the tape for the hearing officer to keep with the records of the hearing)
- Complete description of items and their value
- Police reports or loss prevention documents
- Company handbook and/or policy
- Acknowledgment of receipt of the policy

Fighting on company property

- Statements from witnesses (only if they cannot attend the hearing (may be considered hearsay testimony))
- Medical records of injuries
- Police reports
- Company handbook and/or policy
- Acknowledgement of receipt of the policy
- Records of verbal and written warnings



Harassment of employees

- Statements from witnesses (only if they cannot attend the hearing (hearsay testimony))
- Company handbook and/or policy
- Acknowledgment of receipt of the policy
- Records of verbal and written warnings

Shortages or overages of company funds

- Merchandise receipts
- Cash register tapes
- Company handbook and/or policy
- Acknowledgment of receipt of the policy
- Records of verbal and written warnings

Misuse of company funds

- Signed or written admissions
- Video (request an in-person hearing, contact the hearing officer to determine if you must provide your own equipment and bring a copy of the tape for the hearing officer to keep with the records of the hearing)
- Merchandise receipts, cash register tapes
- Company handbook and/or policy
- Acknowledgment of receipt of the policy
- Records of verbal and written warnings
- Expense reports, reimbursement ledgers, etc.

Destruction of company property

- Pictures of property damage
- Records of repair estimates
- Police reports
- Written admissions
- Signed witness statements (hearsay evidence)
- Company handbook and/or policy
- Acknowledgement of receipt of the policy
- Records of verbal and written warnings

Falsification of company records

- Records which were falsified
- Proof of falsification
- Company handbook and/or policy
- Acknowledgement of receipt of the policy
- Records of verbal and written warnings



Witnesses for Discharge Issues

Remember! A firsthand witness is the person(s) who actually saw or was involved in the final incident leading to the separation, not necessarily the person who discharged the employee.

- Human resource director or the person who keeps such records and can explain the company policy and the claimant's knowledge of the policy.
- Claimant's immediate supervisor or a member of management who discharged the claimant
- Members of management who were involved in the progressive disciplinary action with the claimant
- Claimant's co-worker or any individual who witnessed the incident resulting in the claimant's dismissal
- Medical technician or a qualified person who can explain test results, accuracy of rates and chain of custody in the lab work for drug and alcohol tests
- Loss prevention personnel who conducted the investigation or witnessed the claimant's confession in the incident (i.e., theft, destruction of company property, shortages, etc.)

Refusal Of Work _____

Records

- Previous work history (duties and salaries)
- Description of the job offered (including the rate of pay, hours worked, length of the assignment and way in which the offer was made)
- Records of reason for refusal

Witnesses

- Individual who made the job offers to the claimant
- Individual to whom the claimant told he would not accept the job offer (if different from the individual who offered the job)



Availability_____

Records

- Medical records or doctor's statements
- Leave of absence documents
- Application indicating limitations
- If a temporary service employer, the policy stating the employee must contact the employer for a new assignment
- Company handbook and/or policy
- Acknowledgment of receipt of the policy

Witnesses

- Individual to whom the claimant advised he was limiting his availability
- Individual who is able to testify regarding records and policies

Pay_____

Records

- Pay stubs showing pension payments, vacation pay, severance pay, Worker's compensation, etc.
- Company handbook and/or policy
- Acknowledgment of receipt of the policy
- Medical records if the issue is worker's compensation

Witnesses

- Individual who can testify regarding the pay records and policy



After The Hearing

After the hearing, you should receive a hearing decision. The decision outlines the facts obtained at the hearing, the applicable laws or regulations on which the hearing officer based his decision and his conclusion either to uphold or reverse the initial determination on the claim.

You may appeal an unfavorable decision to the state's Board of Review. At this level, no new facts may be presented. Rather, you may question the hearing officer's conclusion based on the facts previously presented and the application of state regulations. The appeal should state, in detail, why you believe standard procedures were not followed or certain facts were not considered.

Most states require you submit a written argument with your appeal; however, a few states may allow you to present your argument in-person. In response to both written and oral arguments, the state will determine whether to affirm the hearing officer's decision or remand the case to a lower appeal level.

Appeals beyond the Board of Review must be filed with the state Circuit Court of Appeals. At this level, the appellant is filing a lawsuit against the state. Therefore, if you decide to pursue a Circuit Court appeal, you should do so through your company's attorney or legal department.

Glossary

Able To Work

Eligibility requirement under which a claimant must be physically and mentally capable or working.

Actively Seeking Work

Eligibility requirement in which the claimant must report to the local employment office as scheduled, file job applications, go on interviews and report verifiable job contacts to the state.

Adjudication

The deliberation process in which the validity of an unemployment claim is determined by the state.

Administrative Law Judge

See Hearing Officer.

Affirmed

The action taken by the Board of Review in which it agrees with the decision of the hearing officer.

Appeal

The protest of a determination or decision rendered by the state regarding an unemployment case.

Available For Work

Eligibility requirement in which the claimant must be accessible for job interviews and willing to accept suitable job offers.

Claimant

The individual filing a claim for unemployment benefits.

Collateral Estoppel

Doctrine which allows the use of a decision from a legal proceeding involving the same issues and parties to be used in further litigation.

Continuance

The act in which a hearing is temporarily halted and resumed at a later date at the point at which it had left off.

Decision

The hearing officer's judgment regarding a claimant's eligibility for unemployment benefits based on the information provided at a hearing.



De Novo

A decision by the Board of Review in which it orders a case be readjudicated from the beginning, as though no prior determination or decision had been made.

Discharge

A termination of employment in which the employer is the moving party.

Disqualification

A judgment by the state in which the claimant is disallowed unemployment benefits for a specified period.

Duration Suspension

A Decision in which benefit charges are deferred until the individual has served his entire disqualification period. Any benefits paid after the disqualification is served may be charged against the employer's account.

Good Cause

In voluntary quit case, a compelling reason that can be attributed to the employer. In a discharge situation, willful and deliberate misconduct by the employee.

Hearing

The first level in the unemployment appeal process. The employer and claimant appear before a state hearing officer to present testimony and evidence regarding the unemployment issues.

Hearing Officer

The state official who oversees and makes the decision regarding an unemployment hearing.

Interested Party

The individuals or entities involved in the unemployment appeal process (the claimant, the employer and the state).

Issue

The topic of discussion in the adjudication process.

Misconduct

A willful and deliberate act displaying a disregard of the employer's interest or negligence that could jeopardize the safety or property of the employer or the claimant's co-workers.

Non-Charge

A decision in which the employer is exempted from charges for benefits paid to a former employee.



Postponement

A situation in which a hearing date is delayed at the request of one of the parties involved.

Referee

See Hearing Officer.

Refusal Of Suitable Work

The act in which a claimant turns down an offer of work with similar conditions to his prior job, or similar jobs in the area, and for which he is qualified through training and experience.

Relief of Charges

See Non-Charge.

Remand

A decision that an unemployment case be sent back to a lower level in the appeal process (such as the Board of Review back to a hearing).

Reopen

An act in which the state allows a case to be reviewed, because relevant facts were not considered in the determination.

Separation

Severance of the employee-employer relationship.

Voluntary Quit

A Separation from employment in which the employee is the moving party.



This information has been prepared by ADP Unemployment Group. We hope it will aid you in understanding, preparing for and presenting your case at the unemployment hearing. ADP Unemployment Group, The ADP Unemployment Group is staffed to assist you in preparing for each hearing; therefore, we encourage you to use this service for all your hearings and any related problems.
